

**COMMONWEALTH OF MASSACHUSETTS**

**BARNSTABLE, ss.**

**SUPERIOR COURT  
CRIMINAL ACTION  
NO. 2000-48590**

**COMMONWEALTH**

**vs.**

**CHARLES ROBINSON**

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S  
MOTION TO PRECLUDE ANY MEDICAL AND/OR PSYCHOLOGICAL  
EVALUATION BY THE COMMONWEALTH**

On August 21, 2000, the defendant, Charles Robinson, was found guilty of first-degree murder, as well as assault and battery with a dangerous weapon. The defendant appealed the conviction pursuant to G. L. c. 278, §33E; on August 31, 2001, the Supreme Judicial Court stayed the appeal pending the disposition of the defendant's motion for new trial by the Superior Court. In the ensuing years, the defendant has filed numerous motions for funds to employ psychiatrists or psychologists, ultimately retaining three different practitioners. A multi-day hearing on the new trial motion was held in April, 2004, but could not be completed due to the defendant's evaluation under G. L. c. 123, §15 and subsequent commitment under G. L. c. 123, §18. Several years of inaction followed with intermittent periods of commitment, and competency evaluations on multiple occasions. In 2011, this jurist ordered the defendant to file an amended motion for new trial with a supporting mental health evaluation affidavit, and held that any testimony on the matter would commence anew. On August 8, 2014, the Commonwealth moved to have the defendant examined by their own expert, Dr. Martin Kelly, regarding his competency in 2000, at the time of the trial. On October 3, 2014, the motion was allowed without reference to any period within which such examination must be completed. On

October 9, 2015, after a year had passed without the completion of Dr. Kelly's examination, the defendant brought the instant motion to preclude the Commonwealth from having Dr. Kelly, or any other expert, evaluate the defendant.

#### *A. Due Process*

The defendant relies on *Commonwealth v. Swenson*, 368 Mass. 268, 279-280 (1975), for the proposition that Dr. Kelly's failure to perform an evaluation within a year of the allowance of the prosecution's motion constitutes a violation of the defendant's Fourteenth Amendment right to pursue postconviction proceedings without "unreasonable" delay attributable to the Commonwealth. However, *Swenson* makes no reference to "unreasonable" delay constituting constitutional error; the standard is much higher.

The *Swenson* court held that there is no general "constitutional right to a speedy appeal", and only speculated as to what type of "specific circumstances not present [t]here" might "rise to the level of constitutional error", "such as deliberate blocking of appellate rights or inordinate and prejudicial delay without a defendant's consent". *Id.* While the Commonwealth argues that *Swenson* applies only to appellate actions, not to a motion for new trial, the Supreme Judicial Court recently applied a *Swenson* analysis to delays in new trial motions related to the Hinton drug lab, and thus this court will assume *arguendo* that *Swenson* applies here. See *Bridgeman v. Dist. Attorney for the Suffolk Dist.*, 471 Mass. 465, 478-480 (2015) ("Given the unprecedented circumstances surrounding the debacle at the Hinton drug lab, and the substantial efforts that are being made to deal with the impact of Dookhan's misconduct on affected defendants, we conclude that, at this juncture, any delays in the provision of postconviction relief do not 'rise to the level of constitutional error.'").

However, the defendant has failed to establish either of the two grounds set out in *Swenson* for a due process violation. First, the defendant claims only that the delay is "unreasonable", and presents no evidence that it was a "deliberate blocking of [new trial] rights". See *Swenson*, 368 Mass. at 279. Indeed, the Commonwealth asserts that Dr. Kelly's evaluation has been delayed by the defendant's failure to produce data collected during psychological testing by his own expert, which was requested pursuant to the parties' discovery agreement. (Exhibits C & D to Paper 177). In the absence of evidence that the delay was a "deliberate" attempt to block the defendant from pursuing his new trial motion, the defendant cannot establish a due process violation under the first *Swenson* scenario. *Id.*

The defendant also fails to establish the second *Swenson* factor, because he has not shown that the delay was both "inordinate" and "prejudicial". *Id.* at 279-280. The defendant has arbitrarily selected a one year period as the demarcation of what should be considered an "inordinate" delay under an extension of *Swenson*, but offers no argument as why this should be so. *Swenson* did not identify any specific period as "inordinate". *Id.* at 280. In this case, neither the Commonwealth's motion to evaluate, nor the court order, referenced any time limitation. The new trial proceedings have been delayed for a total of nearly fourteen years; the defendant only attributes the most recent year of that delay to the Commonwealth. Indeed, the record shows no objection by the defendant when at least one of his own psychiatric experts took several years to complete an evaluation, which accounted for a substantial portion of the prior thirteen years of delay. Thus, it remains entirely unclear what period of delay in psychiatric evaluation would be so inordinate as to constitute a violation of the defendant's due process rights, given the drawn-out history of these proceedings. Certainly, there is no special

significance to a one-year period.

Further, the defendant makes no arguments as to how this delay has prejudiced him, which is required under the second *Swenson* scenario. There, the court held that a three and one-half year delay in docketing the defendant's appeal did not constitute a due process violation because the defendant did not show prejudice or harm from that delay. *Id.* at 280. Here, the one-year delay occurred in the context of the defendant's life sentence without the possibility of parole. The ordered psychiatric examination is to be performed at the defendant's present correctional facility location, without outside hospitalization, and thus the defendant has experienced no change in his incarceration circumstances during the delay.

As noted above, these new trial proceedings have been subject to extensive prior delays, largely of the defendant's own making. The one-year delay at issue here appears to be largely attributable to the defendant's failure to produce psychological testing data pursuant to the discovery agreement, not to foot-dragging by the Commonwealth's expert. The defendant has made no showing that any evidence or witnesses have been lost during the one year delay, nor that he has suffered a material difference in his circumstances during that year. See *id.* Accordingly, the defendant has failed to prove a due process violation under *Swenson*, where there is no evidence he suffered harm from the October 2014 to 2015 delay, or that such delay was intentionally undertaken by the Commonwealth to block the defendant's postconviction rights. *Id.*

#### **B. G. L. c. 123, § 15**

The defendant next argues that G. L. c. 123, § 15(b) requires the Commonwealth's expert to perform the evaluation within 40 days of the court's allowance of the motion. This argument

also fails. The Commonwealth's motion cited G. L. c. 123, § 15 without specific reference to any subsection, and this jurist's order made no finding as to what portion of the statute applied. However, the intent of the order was clear: no action under Section 15(b) was contemplated or carried out.

Section 15(b) refers to hospitalization at Bridgewater or other such facility "after the examination described in paragraph (a)" "for observation and further examination" within a period that "in no event shall . . . exceed forty days from the date of the initial court order of hospitalization". In contrast, G. L. c. 123, § 15(a) describes an "examination . . . conducted by one or more qualified physicians or one or more qualified psychologists" that "[w]henever practicable" shall occur in "the court house or place of detention where the person is being held". Section 15(a) is a prerequisite to Section 15(b), and unlike the latter provision, does not contain any restriction on the time period in which the examination must be performed.

In allowing the Commonwealth's motion for examination under Section 15, this jurist did not order his "hospitalization" under Section 15(b). To the contrary, during the time period at issue here, October 2014 to 2015, the defendant remained solely in state prison; he was not hospitalized at Bridgewater State Hospital or other such facility. Where this court's order did not hospitalize the defendant under Section 15(b), the associated forty-day time restriction contained within that subsection is not implicated. In light of the defendant's on-going incarceration in state prison on a life sentence, and the expert's ability to conduct a Section 15(a) examination "at the place of detention where the person is being held", there is no liberty interest that would trigger the type of time restrictions seen elsewhere in the statute. For those reasons, the defendant cannot prevail on his argument that Section 15(b) requires the Commonwealth's expert

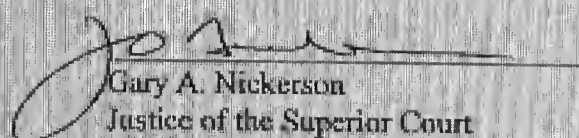
to perform the examination within forty days of the order allowing the evaluation motion.

***C. Laches, Waiver and Estoppel***

Lastly, the defendant raises an argument in equity that Dr. Kelly's unreasonable delay over the past year should preclude any future examination under the doctrines of laches, waiver and estoppel. This is not the case. "Laches is not imputable to the government, nor, in general, can its rights be lost by delay." *Commonwealth v. Dow*, 46 Mass. 329, 333 (1842). Even if these equitable doctrines were applicable to the Commonwealth in a criminal, postconviction proceeding, the defendant has failed to show that the delay caused him prejudice or detriment. See *Jubenville v. Jubenville*, 313 Mass. 103, 105 (1943) (mere delay without showing of prejudice or harm insufficient to establish laches).

**ORDER**

For the foregoing reasons, it is **ORDERED** that the defendant's Motion to Preclude Any Medical and/or Psychological Evaluation by the Commonwealth is **DENIED**. If further issues relating to the discovery agreement require attention, the parties must file an appropriate motion with the court.

  
Gary A. Nickerson  
Justice of the Superior Court

Dated: December 3, 2015